OPENING STATEMENT

Basic Prosecutor Course
August 2016

"You don't get a second chance to make a good first impression"

I. Introduction

Opening statement may very well be the most important part of the trial. At no other time is the jury more attentive and receptive to your case. Why is the opening statement so important? First, it is generally the jury's first real impression of you and your case. Those initial impressions are lasting. The jury's view of you as a prosecutor – your knowledge, competence, preparedness – is formed largely in the opening statement. Your credibility before the jury throughout the trial is critical. Second, a well delivered, forceful opening will get the jury's attention and will clearly lay out the facts of the case. That type of effective opening can have a lasting impression throughout the trial. The State has what is called "the burden of clarity" in every case. That is, it is the State's responsibility to make sure that the jury understands clearly what the case is about. If your presentation of the issues or the facts becomes confused, the defense will use that as reasonable doubt. So, the opening statement is an opportunity for you to make a strong first impression and to lay out your case clearly and concisely to the jury.

II. The Importance of Opening Statement: The Why

There are several reasons why the opening statement is so important to your success as a prosecutor. First, jurors tend to make their minds up early to the innocence or guilt of the defendant. This is reflected in a study from the University of Chicago in

studying jurors' behavior in trials. A finding in this study concluded that eighty percent (80%) of jurors form opinions following opening statements and do not change those opinions after hearing all the evidence.[1] In other words, jury's verdicts were consistent with their initial impressions after the opening statement. Therefore, jurors form their first, strongest, and lasting impression of your case after listening to your opening statement.

Second, we have all heard the old phrase, "repetition is the mother of all learning." There are many studies that have supported that repetition is a key in learning and then in retaining that information. In the trial setting, you have at least four opportunities to repeat your theory of the case to the jury: (1) opening statement, (2) direct examination, (3) cross examination, and (4) closing arguments. Make sure that first opportunity to tell the jury your story counts.

Third, that which is heard first by the jury will be remembered best. Research has shown that people will generally remember what is said first, through the concept of primacy. Social scientists tell us that most people in a social setting develop a first impression within four minutes of speaking or listening to someone. How important is the first scene in a movie, or the first minutes of a television show, or the first chapter of a book? How the opening begins is so important that it must be structured in such a fashion to grab the attention of the jury. The jury will remember what you promised to deliver and the manner of your delivery – make good on those promises.

Fourth, opening is a great opportunity to layout your theory and theme of the case. A theme is a short, colorful synopsis describing what the case is about. The goal is to get the jury's attention, to make them want to know more. Once the theme is stated, you can

[1] Riley, The Opening Statement: Winning at the Outset", American Journal of Advocacy 225 (1979).

continue with the opening and fill in the details. Be sure to weave the theme throughout your case and return to it in the closing.

III. Professional Responsibility: The What

What are prosecutors allowed to say in an opening statement? What are prosecutors not allowed to say in an opening statement? The general rule, as you know, is that in an opening statement you are allowed to tell the jury the facts of your case and give them an overview or outline of the evidence. But what does that mean? What does that include? What does that exclude? Take a look at some of these general rules.

The Utah Rules of Professional Conduct 3.4 (e) states that a lawyer shall not:

> [i]n trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by the admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the ***guilty or innocence of the accused*** (emphasis added) . . . .

Furthermore, it is improper to argue your case in opening statement. The United States Supreme Court addressed the purpose and scope of opening statement in United States v. Dinitz, 424 U.S. 600 (1976):

> "An Opening Statement has a narrow purpose and scope. It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; ***it is not an occasion for argument*** (emphasis added). To make statements which will not or cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct. Moreover, it is fundamentally unfair to an opposing party to allow an attorney, with the standing and prestige inherent in being an officer of the

> court, to present to the jury statements not susceptible of proof but intended to influence the jury in reaching a verdict." (Concurring opinion of Chief Justice Burger Affirming trial court's ruling of defense impropriety.)

In addition, in opening statement you must state facts. By contrast in closing argument, you can argue: (1) conclusion, (2) inferences, (3) credibility, (4) use of common sense, i.e., matters beyond just the evidence. However, how do you draw the line between what is argument and what is factual? Here are two suggestions: First, when considering a particular statement or comment for opening, ask yourself whether a witness will testify as to what you are saying. If a witness will testify to what you are saying, the statement is legally proper. Conversely, if a witness will not testify to it and no exhibit supports it, chances are the statement is in the nature of argument, opinion, or some other improper comment. Second, there are gray areas upon which judges vary. Your judge may allow some leeway in how far you maybe able to go in your opening. There are often no right or wrong answers in this area and in the close call, you will simply have to know your judge.

It is improper to instruct on the law in opening statement. The following are examples that should be avoided: (1) "The court will instruct you on various factors to consider in judging the credibility of a witness. One of those factors is . . . ; and (2) "The intoxilyzer 8000 results of .30 is three times the statutory maximum." Each of these two examples instructs the jury on the law and is improper. In addition, the second example is argumentative.

It is improper for the lawyer to testify. A clue that you might be testifying would be by starting a sentence with "I think . . . ," "I submit to you . . . , and "I believe . . . . This form would be improper in closing argument also.

Constitutional rights are safe-guarded in criminal cases and, therefore, cases can be mistried or even reversed for improper comments during opening statement. Be careful. Please refer to Exhibit A and Exhibit B for case law that is applicable to opening statements.

IV. Technique and Strategy: The How

Now that you know what you can say and what you cannot, how do you deliver an opening statement that is memorable, forceful, clear, and concise? Here are some suggestions. The judge just informed the jury that the State will now present their opening statement. The jury has pique interest. You, as the prosecutor, have the jury's complete and undivided attention. They are excited. So, you step up to the podium or lectern and describe road maps, puzzles, birds eye views, you wrap yourself around the flag, give a civics-class exposition on the virtues of the American jury system, etc. Right? Wrong! DON'T DO IT! Get right to the point and set the stage by giving your theme.

A. Theme

Your trial theme should be expressed in a single sentenced that captures the moral force of your case. Capsulate the entire case in a sentence or two and put that in your introduction as the first thing you tell the jury. By capturing the entire case in a sentence or two you will grab the juror's attention, keep their attention, and give them something

to hold onto throughout the trial. Frame your theme as fact opposed to opinion or characterization and state that theme at the beginning and end of your opening statement. Don't lose the jury by wasting precious minutes meandering off topic or ingratiating yourself with the jury.

B. Tell a Story

After you state your theory then communicate your story to the jury. You want to communicate your opening like a good story. The importance of access to the jury's imagination cannot be underestimated. How you deliver your opening can make the complex simple, the boring interesting, and the dull exciting. Your opening should have a beginning, middle, and end. In the beginning, you grab their attention with your theme as discussed above. The middle is where you provide the facts, theory, and elements of your case with your theme wove throughout. The end or conclusion should be dramatic and powerful and connected to your opening. It should end with a call to action. Plan out the ending of your opening. Make it short, simple, and direct. For example, "at the end of this trial, I will have the opportunity to talk to you once again. At that time I will ask you to find this defendant guilty of first degree murder. Thank you." If a trial is a persuasive story, the opening statement is the prosecutor's first opportunity to tell the whole story without distraction or interruption. Take full advantage of this opportunity by communicating your story clearly, succinctly, and persuasively.

During the opening get the defendant into the picture as soon as possible. This is especially important in cases where identification (who did it) is the only issue. Identify the defendant early in opening statement and refer to him after that. Don't create doubt

about who was driving, who broke into a house, or who shot the victim by stating, "a person drove by," "a man broke in," or "someone shot the victim." Instead, identify the defendant early in your opening: "The defendant drove by" (actual physical control case), "the defendant broke in," or "the defendant shot the victim." Or better yet substitute the defendant's name, "Mr. Smith drove by," Bill broke in," or " Sam shot Ann."

Remember to employ tools of persuasion in your story. The three pillars of persuasion are something you may employ as you prepare your opening statement. Logos means you should use logic in your story such as incorporating facts, data, or information from testifying experts. The ethos pillar's focus is on credibility which is gained through speaking with self-confidence, conviction, determination, and seeking common ground. Pathos is using emotion to connect with the jury by using metaphors, evoking senses (visual, hearing, taste, smell, touch), telling stories, or providing vision. Other persuasion techniques to consider are: using present tense, telling the story from the witness' perspective, repeating words and theme through statement, following the Rule of threes, or employing rhetorical questions.

When you tell the story, describe the scene. It brings the jury into the story. Some details to provide may be date, time, weather, lighting, sound, scent, touch, sight, and taste to connect the jury to the perspective of the witness.

C. Things to Avoid

During your opening eliminate repeated use of "the evidence will show." Many prosecutors state repeatedly "the evidence will show…the evidence will show…the

evidence will show…" This is not effective. This is archaic. You are telling the jury a persuasive story, make it smooth and interesting, don't splice it up.

Worse yet, many prosecutors state in opening that, "Whatever I say here is not evidence." Seriously? Such a disclaimer is ineffective. The effect should be: "this is what happened…" not "this is what might have happened…" You are telling the jury as it was. There is no question about it.

Do not become overly caught up in the details. How much detail should you go into in opening statement? It depends on the case. In general, you must always positively and adequately state the facts of your case. Opening statement is generally not the place for minute detail, however. You want to emphasize the evidence that is crucial to your case. The opening statement should pique the jurors' interest and make them want to know more. Jurors may become distracted by too many details in the opening and have no frame of reference to determine what they need to remember.

D. Charts, Diagrams, and Demonstrative Aids

The use of charts, diagrams, and demonstrative aids in opening statement will not only help the jury understand what you are saying, it will also help the jury retain what you say. For some reason, demonstrative aids are often overlooked by attorneys when it comes to the opening statement. Don't overlook it. The demonstrative aid need not be elaborate. For example, you may want to draw a diagram on an easel during your opening statement, and use the diagram to make your comments to the jury. This can be done by drawing, for example, the layout of a grocery store and showing where a person was when a retail theft or robbery was committed. It may also be done by drawing an

intersection and showing where the defendant drove and the turn he took. The point is to use demonstrative aids to assist the jury in understanding and retaining your version of the facts. The defense will almost always object, claiming the visual aid is "not in evidence' or "prejudicial." So what? Consider rebutting these types of claims by using the cases in Exhibit C.

E. Be Organized and Prepared

Be organized and logical in your presentation. It is critically important that the jury understand exactly the facts of your case. You can assist the jury by being organized and logical in your explanation of the State's case. Often a chronological explanation is best, but sometimes you may want to go topic by topic. Consider other good story telling elements like foreshadowing ("Officer Smith walked up to the truck, unaware of what would occur next") or flashbacks ("He told her she was going to pay for being worthless but she thought she had been so good because she had made him a meal, bathed the kids, and had them ready for bed.") Regardless, your statement should be organized and clear so that the jury can follow it and remember it.

Prepare, Prepare. Prepare. There is no substitute for thorough preparation and complete mastery of the facts of your case. That knowledge and mastery will be evident when you deliver the opening. You should know the facts of your case better than anyone else, including the witnesses since you will have access to all their information. Review all the evidence in the file, the police reports, videos, diagrams, and photos. Learn how to pronounce the legal terms and names of witnesses in your case. Knowing the facts demonstrates to the jury that you care about the case.

F. Language, Mood, and Tone

Use plain language in your presentation. This is not a speech or oratory contest. Do not be stilted. Be conversational. Talk to the jury, not at the jury. Use simple language, not jargon or legalese. For example, regular folk don't "exited vehicles, they "get out of cars", they "watched a house", not "surveilled the house", and normal folk say the "defendant said", not "the defendant indicated."

Also, state facts, not conclusions, for example: (a) Not, "We believe the evidence will show that the defendant tried to avoid detection." Instead, "Officer Johnson found the defendant hiding under a table in the living room."; and (b) Not, "The officer will explain that the defendant had a bad driving pattern." Instead, "The defendant was driving at 60 miles per hour in a 35 miles per hour zone, weaving from lane to lane, with his lights out."

The tone and mood of your opening, as well as the other phases of trial, should be tailored and adapted to fit the facts and circumstances of the charges (e.g., murder versus retail theft), the type of defendant (e.g., career criminal versus first time offender), and the type victim (e.g., convicted felon versus innocent bystander) should all be taken into consideration. For example, a DUI trial of a first time offender housewife who was under the influence of prescriptive drugs is a misdemeanor, not a capital felony. DUI charges are serious: the defendant, however, is not Charles Manson. Think through the appropriate tone and mood before you go on the "attack."

G. Credibility

Be sincere and speak with conviction. The general rule, of course, is that a lawyer is not a witness in the case and cannot testify. While obviously this is true in the technical sense, the fact of the matter is that if a jury views you as competent, knowledgeable, prepared, and honest, you will become the State's most important "witness." As such, speak with sincerity and conviction. The jury's trust in you and your belief in your case often makes the difference between winning and losing.

Do not overstate your case. Any type of exaggeration or puffing that is unsupported will damage your credibility. If you have a weakness in your case and you know that it will be coming out at trial, it is often best that the jury hear it from you and not from the defense attorney. By stating it first, you can lessen the impact of it and treat it as if it were no big deal.

H. Objections

Should you object during opposing counsel's opening, that is the question. There are a number of schools of thought on objections during opening statements. One school says the prosecution should never object in opposing counsel's opening statement. The jury views it as hiding evidence. Another school says if it is legally improper, then an objection should be made; jurors expect it. I am in between these two schools of thought. Objections by the prosecution during defense's opening statement should only be made when absolutely necessary.

I. Be Yourself

Not every prosecutor has the gift of telling stories. Some of us do better standing still, while others are movers. Some speak with their hands and others keep them in their pockets or behind their backs. Some of us speak loud and others speak soft. Whatever you are, just be you. The moment you stop being you and try to be someone you're not, the jury will notice that and will likely shut you off. Find your strengths and maximize them. Recognize your weaknesses and improve them. There is inherent credibility that comes with being "you."

V. Conclusion

This outline is a starting point, not an ending point. It sets forth an approach to opening statement and is not intended to provide definitive answers. It is clear, however, that many well-accepted, traditional methods of delivering an opening statement are simply ineffective. By stepping back and critically evaluating your opening statement and by constantly striving to improve you can dramatically improve your opening statement and trial skills.[2]

[2] The ideas in this have been liberally borrowed from several sources.

EXHIBIT A

Opening Statements

"The purpose of an opening statement is to apprise the jury of what counsel intends to prove in his [or her] own case in chief by way of providing the jury an overview of, and general familiarity with, the facts the party intends to prove. It is generally accepted that an opening statement should not be argumentative." *State v. Williams,* 656 P.2d 450, 452 (Utah 1982).

"An opening statement has a narrow purpose and scope. It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument." *United State v. Dinitz,* 424 U.S. 600, 612 (1976) (Burger, C.J., concurring)

"Purpose of an opening is to give broad outlines of case to enable jury to comprehend it; it is not to poison jury's mind against defendant, and it is not to recite items of highly questionable evidence." *Gov. of Virgin Islands v. Turner,* 409 F.2d 102, (3rd Cir. 1968).

- Free to outline what in good faith expect the evidence to be, even if some of it is not later admitted. *Frazier v. Cupp,* 394 U.S. 731, 736-37 (1969).

- When prosecutor stated, "I think our evidence is strong and . . . you will be convinced and I will ask you to convict," after previewing the elements of a crime, the Court held it was not "obviously erroneous." *State v. Larsen,* 2005 Utah App 201, ¶ 11, 113 P.3d 998.

- You may not bolster a witness' credibility. *State v. Perez,* 946 P.2 724, 730-32 (Utah App. 1997).

- It is proper to refer to extraneous bad acts if the Court already ruled they are admissible in a pretrial hearing. *Cristini v. McKee,* 526 F.3d 888, 900 (6th Cir 2008).

- You cannot publish exhibits which have not been admitted into evidence. *Bell v. State,* 172 P.3d 622, 627 (Okla. Crim. App. 207).

EXHIBIT B

Applicable to Both Opening and Closing Statements

- You can't misstate the law, including the burden of proof. *State v. Hovater,* 914 P.2d 37, 44-45 (Utah 1996); *State v. Todd,* 2007 UT App 349, ¶ 28, 173 P.3d 170; *State v. Longshaw,* 961 P.2d 925, 929 (Utah Ct.App.1998).

- You cannot call the jury's attention to matters the jury would not be justified in considering. *State v. Span,* 819 P.2d 329, 335 (Utah 1991).

    - Alluding to outside, unadmitted evidence or reference inadmissible evidence. *State v. Larsen,* 2005 Utah App 201, ¶ 13, 113P.3d 998.

        - Prosecutor implied he had outside knowledge when he said, I know it's the truth." *United States v. Lamerson,* 457 F.2d 371, 372 (5th Cir. 1972)

        - Prosecutor violated courts instruction when used evidence admitted only against a codefendant to infer that the defendant possessed a gun. *U.S. v. Scheetz.* 293 F.3d 175, 186 (4th Cir. 2002).

        - Prosecutor argued the defendant would kill again if he wasn't convicted. *U.S. v. Baptiste,* 264 F.3d 578, 591-92 (5th Cir. 2001).

        - Prosecutor commented on an extraneous knife fight. *DePew v. Anderson,* 311 F.3d 742, 747 (6th Cir. 2002).

        - Prosecutor stated that defendant had raped a thirteen-year-old girl when no evidence of it had been introduced at trial. *U.S. v. White,* 222 F.3d 363, 370-71 (7th Cir. 2000).

        - Prosecutor referenced part of a witness excluded testimony. *U.S. Fletcher,* 322 F.3e 508, 516 (8th Cir. 2003).

        - No evidence supported the prosecutor's reference to dealings between defendant and victim and that defendant had murdered before. *Le v. Mullin,* 311 F.3d 1002, 1019-21 (10th Cir. 2002).

        - No evidence supported prosecutor's assertion of eye contact between co-defendants. *U.S. v. Teffera,* 985 F.2d 1082, 1089 n.6 (D.C. Cir. 1993).

    - Referring to the defendant's alias and to his being a federal witness. *State v. Troy,* 688 P.2d 483, 485-86 (Utah 1984).

- Referencing a defendant's sexual orientation. *State v. Blomquist*, 178 P.3d 42, 50 (Kan. App. 2008).

- Persistently alluding to defendant's net worth and his "Park Avenue" offices. *U.S. v. Sstahl*, 616 F.2d 30, 31-33 (C.A.N.Y. 1980).

- Commenting about a defendant's national origin or citizenship. *Abiodun v. Maurer*, 257 Fed. Appx. 111, 115-16 (10th Cir. 2007).

- Referencing a court's denial of defendant's motion to suppress. *U.S. v. Washington*, 462 F.3d 1124, 1136 (9th Cir. 2006).

- "Throwing mud" at defendant rather than focusing on the evidence. *Brewer v. State*, 2006 OK CR 16, ¶ 10, 133 P.3d 892.

    - Prosecutor called the defendant a liar. *State v. Graves*, 668 N.W.2d 860, 876 (Iowa 2003).

    - Prosecutor said the defendant's alibi was a lie. *Allen v. State*, 2005 WL 974189, at *4 (Iowa Ct. App. Apr. 28, 2005).

    - Prosecutor asked defendant whether a witness had lied. *State v. Carey*, WL 291540, at 4* (Iowa Ct. App. Feb. 9, 2005).

- You cannot inflame the passions of the jury.

    - Prosecutor contrasted the juror's sense of safety in the community with an armed robbery. *U.S. v. Mooney*, 315 F.3d 54, 59 (1st Cir. 2002).

    - Prosecutor said the defendant's argument was an insult to the victim. *U.S. v. Elias*, 285 F.3d 183, 190-192 (2d Cir. 2002).

    - During the penalty phase, the prosecutor talked about the victim's love for her family. *Marshall v. Hendricks*, 307 F.3d 36, 66 (3d Cir. 2002).

    - Prosecutor used an empty chair to represent the victim and referenced the victim's character. *Frazier v. Huffman*, 343 F.3d 780, 792-93 (6th Cir. 2003).

    - Prosecutor argued that the jury would depreciate the seriousness of a murder if they didn't sentence the defendant to death. *Hough v. Anderson*, 272 F.3d 878, 902-04 (7th Cir. 2001).

    - Prosecutor compared defendant to violent drug gangs. *Copeland v. Washington*, 232 F.3d 969, 975 (8th Cir. 2000).

- Prosecutor delivered a soliloquy in the persona of the dead victim. *Drayden v. White*, 232 F.3d 704, 712-13 (9th Cir. 2000).

- Prosecutor contrasted the victim's good character with the defendant. *Spears v. Mullin,* 343 F.3d 1215, 1246 (10th Cir. 2003).

- Prosecutor referenced the plight of "crack-addicted babies" when no evidence was presented about "crack-addicted babies." *U.S. v. McLean,* 138 F.3d 1398, 1405 (11th Cir. 1998).

- Prosecutor suggested the jury should convict defendant to protect others from drugs. *U.S. v. Johnson,* 231 F.3d 43, 46-49 (D.C. Cir. 2000).

- Statement that "had [defendant been a better shot, an accurate shot, there might have been a big difference in the charging situation" was improper. *U.S. v. Foreman,* 199 Fed Appx. 515, 518 (6th Cir. 2006).

- "The prosecutor began his closing at the penalty phase by referring to a television news report ... about gangs in Los Angeles' and stating that 'members of the street gangs were murdering each other' in a violent fight for turf. The prosecutor then went on to state that the gang shootings made his blood boil,' and that this case made him want to 'weep and cry' because it was 'the same thing, right here in our backyards.' After a biblical reference to the killings as the 'modern equivalent of thirty pieces of silver,' the prosecutor summed up his closing by giving his opinion that 'there has never, ever been a more complete and utter disregard for the sanctity of human life as this case ... [t]he state of Missouri claims from you the ultimate sentence of this case of death. Stand firm.'" *Copeland v. Washington,* 232 F.3d 969, 972 (8th Cir 2000).

- "[Here is a man that should never, ever be permitted to walk among free people again. ... He has forfeited his right to live as a human being because he chooses to live as an animal-to engage in savage animalistic conduct

- "[T]o believe his testimony, ladies and gentlemen, to believe anything that he told you from this witness stand is to allow yourself to engage in an academic exercise to go into a realm of reality where the Easter bunny is real and the tooth fairy is alive and well.

- "[T]his man has to be removed from society. You owe it to yourself, your family, you children, your grandchildren, your neighbor, everybody else

you know, and those unknown to you. You owe them that responsibility. He should never see the light of day again." *State v. Gann*, 251 S.W.3d 446, 461-62 (Tenn. Crim App. 2007).

- But the following arguments were proper:

    - Prosecutor repeatedly referenced graphic murders because the murders were part of the government's case. *U.S. v. Martinez-Medina*, 279 F.3d 105, 118 (1st Cir. 2002).

    - Prosecutor's statement, that the jury was "deciding guilt for the single most destructive at of terrorism ever committed here in the United States" was based on the evidence. *U.S. v. Salameh*, 152 F.3d 88, 134 (2d Cir. 1998).

    - Comparison between defendant's life and victim's life was grounded in the evidence. *Humphries v. Ozmint*, 397 F.3d 206, 219-23 (4th Cir. 2005) (en banc).

    - Prosecutor told jury to act as the conscience of the community. *U.S. v. Duffaut*, 314 F.3d 203, 211 (5th Cir. 2002).

    - Prosecutor statements that crime as "cold and calculating" and stated defendant robbed victim "while blood spurted out her neck and celebrated the next morning" were grounded in the evidence. *Smith v. Mitchell*, 348 F.3d 177, 212 (6th Cir. 2003).

    - Prosecutor told jury to render a verdict it could be proud of, the correct verdict under the law and the evidence. *U.S. v. Allen*, 269 F.3d 842, 847 (7th Cir. 2001).

    - Prosecutor attacked witness' testimony with inference grounded in the evidence. *U.S. v. Machua-Barrera*, 261 F.3d 425, 436 (5th Cir. 2001).

    - Prosecutor referenced defendant's tax returns after defense counsel referenced them in closing arguments. *U.S. v. Mabrook*, 301 F.3d 503, 509-10 (7th Cir. 2002).

- You can't vouch for a witness' credibility. *State v. Brinklow*, 179 P.3d 1163 (Kan. App. 2008); *Lemus v. State*, 2007 WY 111, ¶ 41, 162 P.3d 497.

EXHIBIT C

The Use of Exhibits during Opening Statements

- There is no Utah case law addressing the use of exhibits during opening statements. But a prosecutor may outline evidence during opening statements which he in good faith believes will be admitted into evidence. *See State v. Williams,* 656 P.2d 450, 452 (Utah 1982); *Fraizer v. Cupp,* 394 U.S. 731, 736-37 (1969).

- The Oklahoma Court of Criminal Appeals has held that prosecutors should not use exhibits in their opening statements. *Bell v. State,* 207 OK CR 43, ¶ 13, 172 P.3d 622. But if they do, they cannot mark them or add captions to photographs. *Id.* And the exhibits must be admitted later during trial. *Id.*

- In Pennsylvania, prosecutors may display exhibits, including demonstrative aids, during their opening statements if there is "no question as to [their] admissibility." *Commonwealth v. Parker,* 919 A.2d 943, 950-51 (Pa 2007); *Commonwealth v. Rickabaugh,* 706 A.2d 826, 837 (Pa. Super. 1997).

- Prosecutors in other states may also display admissible evidence, including demonstrative aids, during their opening statements. *People v. Wash,* 861 P.2d 1107, 1133 (Cal. 1993); *Billings v. State,* 607 S.E.2d 595, 598 (Ga 2005); *State v. Caener,* 19P.3d 142, 151-52 (Kan. 2001); *Elliot v. Warden of Sussex I State Prison*, 652 S.E.2d 465, 477 (Va. 2007).

- Ohio trial courts have broad discretion to regulate opening statements. *State v. Gilbert,* 2005 -Ohio- 5526, ¶ 15, 205 WL 2669639, unpublished, available at http://www.westlaw.com. But they should instruct the jury that opening statements are not evidence and only should allow prosecutors to use exhibits which will be admitted into evidence. *Id.*